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I. INTRODUCTION

{1} While attempting to limit potential sexual harassment suits against the Commonwealth of Virginia, and also promote workplace efficiency, the Virginia General Assembly enacted legislation prohibiting state employees from accessing information containing sexual content from state-owned or leased computers without obtaining prior approval from their agency heads.[2] *Urofsky v. Gilmore*[3] concerns a suit brought by six faculty members employed by several state universities in federal district court alleging that the legislation infringed on their First Amendment free speech rights by unconstitutionally limiting their abilities to perform their jobs. Although the district court found for the plaintiffs, that decision was reversed on appeal, leaving the statute intact.[4]

{2} This casenote examines the decision of the Court of Appeals for the Fourth Circuit in light of the contrary opinion in the lower court. Part II discusses the historical backdrop for both decisions, with specific emphasis on *Pickering v. Board of Education*,[5] on which both courts based their holdings. Part III recounts the factual and procedural history of *Urofsky*, while Part IV reports the decision of the appellate court and the reasons for its divergence from the opinion of the district court. An analysis of the two opinions follows in Part V, and Part VI concludes this casenote by suggesting that, as important an issue as freedom of speech in the context of academic freedom is, the upcoming *en banc* hearing by the United States Court of Appeals for the Fourth Circuit will not overturn the ruling of its three judge panel.

II. THE HISTORICAL BACKGROUND OF *UROFSKY*

A. Statement From the Court on the Extent of Constitutional Protections for Speech

{3} Just prior to the start of the line of cases that has evolved into our present understanding of the constitutional protections afforded speech made by public employees, the Supreme Court had occasion to rule on the constitutionality of an Alabama state libel law. That law made speech " 'libelous per se' if the words 'tend to injure a person . . . in his reputation' or to 'bring [him] into public contempt' ".[6] That law was implicated when the *New York Times* ran a full-page paid advertisement on behalf of the *Committee to Defend Martin Luther King and the Struggle for Freedom in the South*. The advertisement referenced recent events in

Alabama in which African-American students had met resistance in their efforts to "live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights."[7] The advertisement made several assertions about the reaction to the activities by the Montgomery police force. Several of those statements turned out either not to be true or to have been exaggerated.

{4} L. B. Sullivan, an elected commissioner of Montgomery, had supervisory responsibilities for the Montgomery police. Because he felt implicated by the statements, even though neither his name nor position was mentioned in the advertisement, Sullivan brought a civil libel suit against four members of the committee and the *New York Times*. The basis of his suit against the *Times* was that it failed to take reasonable precautions to ensure the accuracy of the advertisement before publishing. Sullivan won his suit, and the Supreme Court of Alabama affirmed the verdict. The *New York Times* appealed to the United States Supreme Court.

{5} In overturning the verdict, and the Alabama state law supporting it, the Supreme Court found unconstitutional the state's placement of limits on protected speech without proper safeguards. Instead, the Court noted that the Constitution protects speech on public issues in all but a few, carefully circumscribed situations. For instance, speech on public issues that had obscene content would not be protected. Neither would be "fighting words."[8] For Sullivan to have prevailed before the Supreme Court, the Court stated that he would have had to demonstrate that the statements were made with either malice or reckless disregard for the truth.

{6} In his concurring opinion, Justice Black thought the Court should have gone further with its limits on a state's ability to legislate protection from speech for public officials. At least in the context of public debate on political topics, Justice Black believed the First Amendment "at the very least . . . leaves the people and the press free to criticize officials and discuss public affairs with impunity."[9]

B. Speech Made by Public Employees Acting in Their Capacities as Private Citizens Is Protected

{7} In a series of cases, the United States Supreme Court addressed the rights that government employees retain as citizens speaking publicly. Two of those cases central to *Urofsky* are *Pickering*[10] and *United States v. National Treasury Employees Union*.[11]

1. The *Pickering* Balance

{8} *Pickering* was the first case of the modern era in which the Supreme Court decided the free speech rights of a government employee.[12] In 1964, a public high school employee named Marvin Pickering was fired by the Board of Education ["Board"] in Will County, Illinois[13] for publicly speaking out against a bond referendum initiated and supported by the Board of Education. After the superintendent of schools sent a letter to the editor of the local newspaper in support of the bond referendum, Pickering responded with his own letter to the paper. Pickering's published letter[14] contained charges that, among other things, the superintendent had acted "to prevent teachers in the district from opposing or criticizing the proposed bond issue."[15] The substance of Pickering's attack on the referendum included information to which he had access as a school teacher, but that was not generally available to the public at large. The Board viewed Pickering's public statements as being insubordinate and terminated his employment with the school district.

{9} After losing his suit for reinstatement in both the Illinois state circuit and supreme courts, the United States Supreme Court heard arguments in March 1968. In deciding for the plaintiff, the Court developed a test that looked at the "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[16] The Court reserved its right not "to lay down a general standard against which all such statements may be judged."[17] It did, however, describe six factors that

future tribunals should consider when determining the rights of public employees to speak out on matters of public concern. These factors include: (1) the need to "maintain[] either discipline by immediate superiors or harmony among coworkers,"[18] (2) "close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning," (19) (3) the detrimental impact of the statements upon the employer,[20] (4) the essentiality for public employees to participate in the free and open debate on matters of public concern,[21] (5) the extent to which the fact of employment relates to the subject matter of the speech,[22] and (6) the consequences exacted on the speaker as a result of his speech.[23]

{10} Justice White wrote an opinion that concurred in part and dissented in part with the majority.[24] He agreed with the holding to the extent that it was consistent with the majority's opinion in *New York Times Co. v. Sullivan*,[25] but disagreed with the inclusion of damage to the employer as one of the six factors to be balanced. His reasoning was that the *Sullivan* holding protected any speech, as long as it was not "found to be knowingly or recklessly false," regardless of its injurious nature.[26] Justice White did allow for the possibility that there may be certain special relationships between a public employer and its employees, such that certain other types of speech might not enjoy the same freedom, but he clearly characterized them as involving "the need for confidentiality or the special obligations which a teacher in a particular position may owe to his superiors."[27]

{11} Where the *Sullivan* Court had held just four years prior that public speech should be accorded a high degree of deference, the *Pickering* court was now using the special circumstances of the fact pattern presented to sculpt possible limitations. Those limitations could not be specified absent the specific facts of a case, but the Court did say that, in determining those limitations, it would balance the six factors previously enumerated.

{12} Pickering won his case because the Court found that he had spoken out on a matter of public concern while doing so in his capacity as a private citizen. In subsequent cases, *Pickering* is characterized by courts and commentators as standing for the principle that the speech of public employees is constitutionally protected *only* when they speak as private citizens on matters of public concern. This simplistic understanding of the Court's holding has fogged subsequent analysis of public employee free speech cases, as will be shown later.

2. National Treasury Employees Union Successfully Fights Congress' Attempt to Curb Government Employee Speech

{13} Congress passed the *Ethics in Government Act*[28] ("Act") in 1989. Among other provisions, the Act denied employees of the executive branch honoraria or other compensation when giving speeches at the behest of organized special interest groups. The intent of that provision of the Act was to remove the opportunity for government employees to be influenced in their employment duties by these special interest groups. While the Act's chief intent was to prohibit elected officials from having their votes influenced, the Act enveloped all employees in each of the three branches of government.[29]

{14} As a result, two unions and several career civil servants employed within the Executive branch filed suit against the United States. The lead plaintiff was the National Treasury Employees Union ("NTEU").[30] The NTEU challenged the constitutionality of the Act as applied to the plaintiffs on the grounds that the Act infringed on speech they made as private citizens while incidentally being employed by the federal government, due to the prohibition against their receiving honoraria. In all cases reported, there was no nexus between the themes of the employees' speech and their employment responsibilities. For example, one plaintiff regularly published articles on Russian history while employed as an attorney for the Nuclear Regulatory Commission.[31] A second plaintiff was employed as a mail handler for the U.S. Postal Service and had given lectures on the Quaker religion.[32]

{15} In striking down the challenged provision, the Court found, consistent with *Pickering*, that the employees had a right to speak as private citizens on matters of public concern.[33] The Court also overturned the challenged provision, because under the doctrine of prior restraint,[34] it "chills potential speech before it happens."[35]

C. Employee Speech upon Matters of Personal Interest

{16} *Pickering* and *NTEU* examined the right of government employees to speak publicly as citizens on matters of public interest. The Court, however did not address the right of government employees to speak publicly on matters of personal interest.

{17} In October 1980, Sheila Myers was fired from her job as an assistant district attorney in New Orleans.[36] Prior to her dismissal, she was informed of her possible transfer to try cases in another section of the criminal court. Myers opposed the transfer and brought it to the attention of several of her supervisors. In the course of discussing the transfer with one supervisor in particular, Myers used the meeting as an opportunity to voice concern over several additional office matters with which she had a problem. After this discussion, Myers authored and circulated a questionnaire that attempted to assess the degree of confidence her colleagues had with the supervision and management of the district attorney's office. This act led to Myers' dismissal for insubordination.

{18} Myers challenged the dismissal on the ground that her freedom of expression was violated. Relying on *Pickering*, Myers based her position on the premise that the public had an inherent interest in the manner in which the district attorney's office was managed, and therefore, she had a right to speak out as a public citizen on that issue. Harry Connick, named individually as the defendant and also in his capacity as district attorney, countered that the speech at issue was of a largely personal interest[37] and was not the type of speech protected under the First Amendment. He further asserted that, as an employer, the government has an interest in promoting the efficiency of its operations, and that Connick should enjoy wide discretion in administering the responsibilities of his office.

{19} The Court sided with Connick's argument, in which he contended that "no balancing of interests [was] required . . . because Myers' questionnaire concerned only internal office matters and that speech is not upon a matter of 'public concern', as the term was used in *Pickering*."[38] Implicit in the *Pickering* balancing approach is an *a priori* evaluation of the speech to determine whether it is of a public or private nature. Only that speech which is deemed to be of a public nature enters the mix of factors to be balanced. The *Connick* court looked to the "content, form, and context of the statement as revealed by the whole record" (39) to determine if the speech met the "public concern" threshold.

{20} In its 5-4 decision, the majority and the dissent effectively differed only on the issue of whether Myers' questionnaire was a matter of public interest.[40] Of the thirteen questions circulated by Myers, the majority found only one that touched on a matter of public concern. On the other hand, the dissent recognized the sum impact of the questionnaire as being of interest to the public.[41]

{21} The *Connick* court made explicit what was merely implicit in *Pickering*. Although it paid lip service to the mandated balancing approach,[42] it explicitly established the threshold for invoking the balancing approach. If the speech in question does not touch on a matter of public concern, then the balancing approach is unnecessary.[43] Justice White gave additional force to this aspect of the *Pickering* holding, stating:

{22} The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, repeated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.[44]

{23} After *Connick*, if the speech is not on a matter of public concern, then the *Pickering* balancing approach is not invoked and the plaintiff loses.

D. The Private Nature of Public Employee Speech Is a Mitigating Factor

{24} Ardith McPherson was employed by the constable of Harris County, Texas. Her job responsibilities were entirely clerical and the nature of her work was such that she rarely came into contact with the public. On the day that then-President Ronald Reagan was shot in an assassination attempt, McPherson remarked to a co-worker that "if they go for him again, I hope they get him."[45] Upon hearing of her remark, her supervisor, Constable Rankin, fired McPherson for making the statement.

{25} McPherson sued Rankin and lost in federal district court. The Court of Appeals for the Fifth Circuit reversed, holding that McPherson's speech was a matter of public concern and "that the government's interest did not outweigh the First Amendment interest in protecting McPherson's speech."[46]

{26} The Supreme Court granted certiorari and affirmed the circuit court's decision. In its first pronouncement on an employee speech case where the topic was a matter of public concern, but where the speaker made her comment privately, the Court's invocation of the *Pickering* test revealed the narrow circumstances under which a statement might not be protected. The Court suggested that, had McPherson's duties not been devoid of public contact and if her job carried with it enforcement responsibilities, then her employer might be able to make the case that her statement interfered with her ability to carry out the job effectively.[47] "[T]he very nature of the balancing test[] make[s] apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise."[48]

E. Courts Address Speech Made by Public Employees in Their Capacities as Public Employees

{27} Whereas, Pickering spoke out as a private citizen on a matter of public concern, and Myers spoke out as a public employee on a matter of private concern, the Supreme Court had not yet laid down a rule for employees speaking out as employees. The Fourth Circuit Court of Appeals recognized this in *DiMeglio v. Haines*,[49] where the unanimous opinion of a three judge panel stated that the *Connick* Court "had not expressly held that speech uttered within the employee's public capacity was not protected."[50]

1. *DiMeglio* Stands for the Proposition that Public Employees Enjoy Limited Protection for Speech Made in Their Capacity as Employees

{28} The *Connick* holding did not go so far as to say that a public employee was never protected when speaking out as a public employee. The Court's holding was limited strictly to a situation in which that employee chose to speak out on a matter of purely personal concern. But, the Court did shed some light on the matter through its dicta, which provided sufficient grist for the Fourth Circuit to begin milling its own position in the case of *DiMeglio*.

{29} The plaintiff, Frank DiMeglio, worked as a county zoning inspector under the supervision of the defendant zoning commissioner, Robert Haines. In the course of his work, DiMeglio had cause to investigate a property not in compliance with county ordinances. About one month after his investigation, he attended a meeting of an area civic association that had some concerns regarding his recent investigation. DiMeglio's presence at the meeting was in his capacity as a county zoning inspector and with the knowledge and blessing of his supervisor. While at the meeting, DiMeglio offered legal advice[51] to the civic association with respect to a settlement being proffered by the offending property owners.[52]

{30} Haines, upon learning the nature of DiMeglio's comments at the meeting, disciplined DiMeglio through an immediate reprimand and a later reassignment to a new territory. DiMeglio filed suit in federal district court against Haines. Haines sought summary judgment on the grounds that he enjoyed qualified immunity

because his actions were discretionary. The district court denied his motion and Haines appealed to the Fourth Circuit. In working its way through the qualified immunity analysis, the court was required to address the issue of the constitutional protection afforded to DiMeglio for his comments to the civic association.[53]

{31} The court did not reach a conclusion as to the protection that should be afforded DiMeglio's speech, but signaled its future direction by implying that the *Pickering* test should only be invoked when two elements are met: the speech was made (a) on a matter of public concern, while (b) in the employee's capacity as a private citizen. The court found it necessary to add this second element to the *Pickering* test because "almost anything that occurs within a public agency could be of concern to the public. . . . [T]he mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment."[54]

2. The Fifth Circuit Holds that High School Curriculum Is Not a Matter of Public Concern

{32} In 1989, the Court of Appeals for the Fifth Circuit held that a high school history teacher did not have the freedom to create his own supplemental reading list without the approval of his superiors.[55] Plaintiff Kirkland submitted his proposed reading list to his school's principal. Kirkland was denied permission to supplement the approved list, but did so anyway. The school board chose not to renew Kirkland's annual employment contract based on his refusal to comply with the school's mandate. The court held that, in order for Kirkland "to establish his constitutional claim, he must have shown that his supplemental reading list was constitutionally protected speech."[56] Since the court determined that the selection of a reading list was not a matter of public concern, the appellant had no constitutional claim.

3. The Fourth Circuit Concurs with *Kirkland* in *Boring v. Buncombe Co. Board of Education*[57]

{33} The Fourth Circuit decided *Boring* in February of 1998. The appellant, Margaret Boring, was a drama teacher who selected a play for her class to perform during a series of statewide drama competitions. The play's subject matter concerned a mother and her three daughters, one of whom was pregnant out of wedlock and a second daughter who was a lesbian. After this incident, Boring was transferred to a new school.[58] One reason given was that her selection of the play violated the school system's "controversial materials" policy.[59] Boring contended that, since the subject matter of the play was of public interest, she was free as an employee to express herself by selecting the play.

{34} An *en banc* hearing by the Fourth Circuit resulted in Boring's transfer being upheld. The court found this to be a matter of curriculum, and the school board had the sole prerogative to make decisions regarding what would be included in that curriculum. The court recalled Justice Frankfurter's admonition regarding "'the four essential freedoms' of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[60] By analogy, the administration of a public high school enjoyed the same freedoms.

{35} The essence of Boring is that, since a high school's curriculum is not deemed to be a matter of public concern, Boring's actions were relegated to that class of speech known as "ordinary employment dispute[s]."[61]

F. Why the Government Has a Freer Hand in Regulating the Speech of its Employees

{36} Through the entire line of the preceding cases, Justice O'Connor recognized that the Court had never commented explicitly as to why government, when acting as an employer, has "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large."[62] Simply put, the answer is that it lies in "the practical realities of government employment, and the many situations in which . . . most

observers would agree that the government must be able to restrict its employees' speech."[63]

{37} *Waters v. Churchill* involved a fact situation in which a nurse employed at a government-run hospital was fired for comments her employer *thought* she had made. The plaintiff, Churchill, argued that her comments were in fact different than those for which she was terminated. The issue before the court was whether the *Connick* test should be applied to the statements made or to the statements plaintiff's employer could reasonably have thought she made. The facts of this case and the Court's holding have no bearing on the discussion that is the topic of this note. However, the analysis Justice O'Connor employs in reaching the plurality's opinion is instructive.

{38} In noting the distinction between the regulation of the two sources of speech, Justice O'Connor makes two points that foreshadow the issues in the case that are the subjects of this note. First, for restrictions on speech of the public at large to be constitutional, they "must generally precisely define the speech they target."[64] However, no one would dispute the government's right to "prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large."[65]

{39} Second, Justice O'Connor drew a distinction between the harms the restriction purports to suppress. In the case of restrictions directed at the general public, the government bears the burden of demonstrating that the harm is real and that the restriction squarely addresses the speech known to cause the harm. On the other hand, when the government acts in the role of an employer, the Court has "given substantial weight to [the] government['s] ... reasonable predictions of disruption, even when the speech involved is a matter of public concern."[66]

G. Summary

{40} Although outside the specific context of employee speech cases, *Sullivan* gives insight into just how cherished the constitutional rights afforded by the First Amendment are to a peaceful society. In addition to the majority's opinion that most public speech is protected, four justices believed it ought be afforded absolute protection.

{41} *Pickering* established the test for determining if an employee's speech, when the employee is speaking as a private citizen on matters of public concern, is protected. That Court also stated that, because the test is fact specific, a hard and fast rule could not be articulated. Instead, six factors should be weighed.

{42} Aside from its concurrence with *Pickering* on all the relevant facts, *NTEU* stands for the proposition that there is a "meaningful distinction between the ex ante prohibition of certain kinds of speech and the ex post punishment of discrete, unforeseeable disturbances."[67] Speech restricted by a government employer that has the effect of chilling employee speech "makes the Government's burden heavy."[68]

{43} *Connick* explicitly held that speech not about matters of public concern is not protected. In determining whether the speech is on a matter of public concern, the courts must look to the "content, form, and context" [69] of the speech. Yet, when the speech rises to the level of public concern, *Rankin* holds that the private nature of the speech lessens its detrimental impact on the governmental employer, and should be protected.

{44} *DiMeglio* offered no holdings relevant to the topic of this note, but it provided a wealth of related commentary. Most important was the Fourth Circuit's foreshadowing of how it might resolve issues when employees speak out *as employees* on matters of public concern. The Fourth Circuit would establish two elements to the threshold test before allowing the *Pickering* balance to come into play. Those elements are that the speech (1) must pertain to matters of public concern a la *Pickering*, and (2) must have been spoken by a public employee in his capacity as a private citizen.[70]

{45} The Fourth and Fifth Circuits used *Boring* and *Kirkland* to shed light on employee speech in the public

schools. The court held that matters of curriculum are local to the operation of the schools rather than a matter of public concern.

{46} Finally, *Waters* explains why it is that, after almost thirty years of public employee speech cases, the government may regulate its workforce with a different set of rules than it can the citizenry. The answer lies in the common sense fact that, for the government to be able to carry out its administrative and operational functions with efficiency and freedom from disruption, it must have greater latitude to control its employees than it has with the general public.

III. *UROFSKY V. GILMORE* CHALLENGES GOVERNMENTAL RESTRICTIONS ON THE ACADEMIC FREEDOM OF STATE-EMPLOYED UNIVERSITY FACULTY

A. The Factual and Procedural History

{47} The Virginia General Assembly amended the Code of Virginia with an act that prohibited state employees from accessing materials of a sexual nature via state-owned or leased computers, unless such access was in conjunction with their work and only when approved in advance by the employee's agency head.[71] The Act became effective July 1, 1996.

{48} The passage of the Act impinged on the asserted educational interests of six faculty members employed by several state universities. The lead plaintiff, Melvin Urofsky, claimed the Act precluded him from assigning certain projects on indecency law to his students due to his inability to check their work for fear that doing so would cause him to violate the Act.[72] A second plaintiff, Paul Smith, was prevented by the Act from publishing an Internet site containing materials on gender roles and sexuality.[73] The Act caused similar incursions into the abilities of the other four plaintiffs to continue the educational and employment-related work they had been doing prior to the Act's passage.

{49} Plaintiffs sought the court's "summary judgment invalidating the Act,"[74] while the defendants sought summary judgment "affirming the Act's validity."[75] The court employed a hybrid *Pickering/NTEU* balancing test and found in favor of the plaintiffs.

1. The Court Cites Five Factors to Be Considered in Its Balancing Test

a. The Government Faces a Higher Standard When Restricting Otherwise Protected Speech

{50} The court found that a plain reading of the Act made it applicable to speech "which lacks 'serious literary, artistic, political, or scientific value;' that is 'patently offensive;' and appeals primarily to a 'prurient interest.'"[76] It further noted "[s]uch speech does not enjoy First Amendment protection."[77] The court went on to find, "however, [that] the Act also applies to sexually explicit speech that is normally protected . . . The Supreme Court has expressly stated that sex is 'one of the vital problems of human interest and human concern.'"[78]

{51} Because the Act "establishe[d] a prospective deterrent 'to a broad category of expression by a massive number of potential speakers,' . . . the government's justification for the restriction must be correspondingly higher."[79] For the court to find the Act constitutional, "the government must demonstrate a compelling

interest, and the restrictions must be narrowly tailored to meet that objective."[80]

{52} Based on the foregoing, however, the court declined to require the "government to satisfy strict scrutiny review, as would be appropriate were the government acting solely as a sovereign."[81] Instead, the court used the higher standard as one of the factors that would "be considered in applying the *Pickering/NTEU* balancing test."[82]

b. State Employees and Potential Audiences Have a High Interest in the Restricted Speech

{53} Not only does the Act restrict "the ability of more than 101,000 public employees at all levels of state government to read, research, and discuss sexually explicit topics,"[83] it also impacts "the right of the public to receive and benefit from the speech of state employees on matters within their areas of expertise."[84] While the government argued that the public's interest should not be a factor in the balancing approach, the court found otherwise.[85]

c. The Act Does Not Squarely Address the Harm the Government Seeks to Prevent

{54} The state introduced five examples of the types of situations the Act was designed to avoid.[86] In response, the court recognized the propriety of the state's interest in dealing with sexual harassment issues and unproductive workers, both of which could be products of the injudicious use of Internet services the Act was designed to prevent.

{55} The court discounted the claims by finding that "the strength of the government's asserted interests must be evaluated in terms of the statute it has crafted to address them."[87] The court went on to say that it found the Act "both fatally overinclusive and underinclusive."[88] With respect to underinclusiveness, the court found that the Act purported to "avoid workplace disruption and ensure efficiency."[89] The Act targeted only "sexually explicit material, . . . but not . . . on-line video games, news services, stock quotes and financial information, chat rooms, and shopping sites."[90] Regarding the Act's goal of avoiding sexual harassment suits, the court noted that the Act does nothing to address content that may be racially, ethnically, or religiously offensive."[91]

{56} The Act's overinclusiveness manifested itself by "restricting all computer use involving sexually explicit material" to the detriment of legitimate "work-related endeavors by state employees."[92] "In doing so, the Act not only burdens those employees who wish to speak or educate the public on topics within their areas of expertise, it also inhibits such employees from obtaining the information needed to inform their views."[93] The court's reasoning for the Act's overinclusiveness with respect to the sexual harassment claim followed in the same vein.

d. The Act's "Prior Approval" Provision Does Not Lessen Plaintiff's Burden

{57} The state contended that, since the Act includes a provision allowing the agency head to approve an employee's circumvention of the Act's restrictions, it is not unduly burdensome. The court, however, did not find this to be the case. It recognized that there had been only three occasions on which the state's thirty-nine institutions of higher education had received requests for approval under the Act.[94] Moreover, the court found the Act, "taken as a whole, . . . [to be] unworkable, . . . largely . . . ignored by state institutions as superfluous and burdensome, or . . . deterring speech by state employees."[95] The court's conclusion was that "[a]ny such inference bodes ill for the Act's validity."[96]

e. Content-Neutral Alternatives Exist

{58} The plaintiffs introduced evidence indicating that content-neutral alternatives not only existed, but had

already been implemented at the state level and at some or all of the state's agencies, including the state's colleges and universities. These policies addressed acceptable computer use and sexually hostile work environments. Indeed, the court noted that two examples of abuse the state had proffered to indicate the need for the Act had, in fact, occurred prior to the Act's passage. Both cases were "resolved under the content-neutral policies existing at the time."[97]

2. The District Court Holds the Act Violative of the First and Fourteenth Amendments

{59} In reaching its conclusion, the court balanced the preceding factors and determined that the "Commonwealth's justifications for the Act [did not] outweigh the interests of thousands of state employees and the public in expression on sexually explicit topics."[98] "The Act's poor fit and the availability of content-neutral alternatives suggest that the Act was intended to discourage discourse on sexual topics,"[99] rather than cure the ills put forth by the Commonwealth.

{60} In essence, the court's balancing approach included only a subset of the factors the Supreme Court articulated in *Pickering* as being those the court should consider.[100] The court did not explicitly consider the working relationship between the government and the employees, the extent to which the fact of employment relates to the subject matter of the speech, and the consequences exacted on the speaker as a result of his speech.

{61} Most interesting is the court's brief analysis rendering *DiMeglio* inapplicable. The court first drew the distinction that DiMeglio involved but a single plaintiff, as compared to the present case's 101,000 potential plaintiffs. Second, the court distinguished *DiMeglio* as being applicable to cases in which discipline is exacted after-the-fact, as opposed to this Act that "prospectively addresses the speech"[101] of the Commonwealth's employees. Since the import of *DiMeglio* is that constitutional protection is not afforded to public employees speaking out in their capacities as public employees, it is unclear how the district court's reasons for dismissing *DiMeglio* are valid.

IV. The Opinion Of The Court Of Appeals For The Fourth Circuit

{62} The Commonwealth of Virginia appealed the district court's ruling and argued before a three-judge panel of the Court of Appeals for the Fourth Circuit. That panel's unanimous opinion reversed the district court's decision.

A. The Speech at Issue Is Not Made by Employees in Their Capacity as Citizens

{63} Where the district court left an opening in its analysis, the appellate court jumped in. "The threshold inquiry is whether the Act regulates speech by employees of the Commonwealth *in their capacity as citizens* upon matters of public concern."[102] The appellate court determined that the "Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees."[103] Therefore, since the Act does not infringe on the rights of employees as citizens, the plaintiffs' freedom of expression in this case is not protected.

{64} This analysis was first brought to bear in the Fourth Circuit's opinion in *DiMeglio*.[104] Although it did not constitute the holding in that case, the court's lengthy discourse on the distinction between the makers of the speech gave the same court the impetus and rationale to enjoin Urofsky and company from application of the *Pickering* test.

B. The Speech at Issue Is Not a Matter of Public Concern

{65} As noted earlier, *Boring v. Buncombe Co*.[105] and *Kirkland v. Northside Independent School District*[106] are fourth and fifth federal circuit appellate decisions holding that high school curricula are not matters of public concern. The statute at issue in Urofsky effectively touches on the curricula of the plaintiffs' universities. If the Act impinges on plaintiffs' abilities to teach their courses, the Act has the de facto impact of shaping the accepted curriculum. Therefore, content of the speech at issue is not a matter of public concern.[107]

C. The Act Is Not Overbroad

{66} The lower court found the Act to be unconstitutional because it is overbroad. That court cited the Act as "categorically restricting all computer use involving sexually explicit material."[108] It noted further that there were countless employees affected by the Act whose legitimate, daily work-related needs made access to the banned material necessary for the successful administration of their duties. Because the Act's ramifications went beyond its intent to stifle potential sexual harassment suits and the promotion of workplace efficiency, the lower court deemed it to be unconstitutionally overinclusive.

{67} The appellate court disagreed with the analysis. While not denying the scope of the Act's impact, the court cited Boos v. Barry[109] to demonstrate that overinclusiveness is at issue only when the regulation "reach[es] a substantial amount of constitutionally protected speech."[110] Since the speech was not constitutionally protected, overinclusiveness could not be at issue.

V. ANALYSIS AND IMPLICATIONS OF *UROFSKY*

{68} Because the appellate court held that the plaintiffs did not pass either element of the threshold inquiry, the factors that would have been balanced under the *Pickering* test were never entertained by the panel. This section first examines the two elements of the threshold inquiry, and then considers how the court might have ruled had it properly recognized that the plaintiffs' academic freedom was a matter of public concern.

A. The Key Issue Is "Matter of Public Concern"

{69} The court's opinion on this issue is little more than a series of disjointed references to prior holdings of the Supreme Court and several circuit courts of appeal, most of which are not helpful in explaining why academic freedom in the university setting does not constitute a matter of public concern.[111] For instance, the court properly cites the Connick analysis of "determin[ing] whether speech involves a matter of public concern . . . [by] examin[ing] the content, context, and form of the speech in light of the entire record."[112] However, the court does not follow up with any such examination. Instead, it moves immediately to a snippet from Terrell v. University of Texas System Police[113] that says "[a]n inquiry into whether a matter is of public concern does not involve a determination of how interesting or important the subject of an employee's speech is."[114]

{70} The next non-sequitur is the court's finding that the location of the speech is irrelevant.[115] This is followed by a curious juxtaposition of the DiMeglio and Connick holdings which states, in effect, that the hat under which the employee makes the speech, i.e. as an employee or as a private citizen, determines "whether [the] speech touches upon a matter of public concern." [116] The opinion finally ends its unfortunate foray with an explanation of how a matter of public concern is not defined by citing Boring. In the only helpful reference to relevant precedent, the court analogizes that, like Boring, the present issue dealt with the issue of curriculum. Ergo, it was not a matter of public concern.

1. The Public Concern Over a High School's Curriculum Is Not the Same as Its Concern Over a University's Curriculum

{71} The swiftness with which the appellate court reached its conclusion in Urofsky is disappointing. Its conclusion that curricular issues are not matters of public concern was grounded in Boring. The facts of that case, however, were dissimilar to the present case, which leaves Urofsky begging for a substantive explanation as to why it fails to pass the threshold inquiry.

{72} Both the *Boring* and *Kirkland* courts reached the correct result, although they did so through faulty analysis. It cannot be disputed that the curricula of our scholastic institutions are, in fact, matters of public concern. The appellate court relied on Boring, through Kirkland, to arrive at the converse conclusion. But, neither of those cases examined why a school's curriculum is not such a matter. Instead, the courts seemed to declare it by fiat.

{73} Countless are the reports of teachers, administrators and school boards being brought to task by the citizenry they serve. Books in school libraries (117) and whether the theory of evolution may be taught[118] are but two prominent examples of when communities have felt so strongly about matters of curriculum that their ultimate resolutions have come from the pen of the Supreme Court. The simple fact is that scholastic curricula at any level of education are matters of public concern.

{74} The reason that both the *Boring* and *Kirkland* courts reached correct conclusions is that, had they employed the *Pickering* analysis, they would have arrived at the same result. Using an abridged version of the traditional analysis, one can see that a simple balancing of the disruptive impact on each of their employers with the rights of each plaintiff to speak publicly about their assigned curricula would have militated in favor of the school boards. The *Boring* court reiterated, "'[a]lthough[] the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.'"[119]

2. The Freedom of Information Act Provision Renders the "Matter of Public Concern" Issue Dispositive

{75} The Act states that when an agency head gives the required approval to access the otherwise restricted material, "such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act."[120] It is interesting that, since none of the seventy codified exceptions exclude this information from the public's eyes anyway, the Act takes an affirmative step to include this provision.[121]

{76} Because the Commonwealth's legislative history does not contain transcripts of committee and general sessions, one can only presume the intent behind the inclusion of this provision. One obvious explanation is that it sends a signal to agency heads that their judgment in granting exceptions under the Act is subject to being monitored by the public. Hence, whereas the Fourth Circuit found academic freedom not to be a matter of public concern, the authors of the Act intended it to be just that. There essentially is no difference in subject matter between a citizen taking an interest in the exceptions granted by a college president and that citizen's same interest in what is being taught in the classroom.

B. The Pickering *Test Has Limited Utility*

{77} The context in *Pickering* was one in which the Court had to determine under which hat the plaintiff was making his statements- that of an employee, or that of a citizen. If it were determined he was speaking as an employee, more weight would be placed on the employer's side of the scale. Conversely, speech made as a citizen would tilt the balance in the plaintiff's favor and earn him the protection of the Constitution. This may or may not have been a close call for the Court to make, but it did recognize that, "[b]ecause of the enormous

variety of fact situations . . ., we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."[122]

{78} To be sure, the plaintiffs in *Urofsky* were concerned over their academic freedom as state-employed faculty. For that very reason, the Fourth Circuit found their speech not to be protected.[123] Yet, the record makes clear that instructional and research faculty are not employees in the general sense of the word. Like medical doctors and other professionals, they have responsibilities and commitments both to their employers and to their professions.

{79} The *Pickering* test has limited utility because it classifies speech only as emanating from either an employee or a citizen. That either/or distinction fails to appreciate that there are at least three points on the human raison d'etre continuum. Professionals fall between the endpoints. When they speak as professionals, any semblance of that speech being that of an employee or that of a citizen is coincidental. As such, the *Pickering* test can easily be, and should be, tweaked to accommodate those who express themselves as hybrid entities.

C. Pragmatism Versus Pickering

{80} Assuming the *Urofsky* plaintiffs had passed the threshold, how might the analysis change? *Pickering* suggests the consideration of six factors to determine whether the balance tilts in favor of the Commonwealth or its employees. Of those six factors, only three have sufficient weight in the present case to bear consideration: (1) the need to maintain discipline and harmony among coworkers; (2) the essentiality for public employees to participate in the free and open debate on matters of public concern; and, (3) the consequences exacted on the speaker as a result of her speech.

{81} The first factor addresses the Act's two objectives. Although no evidence was offered to indicate the degree to which employees were using state-owned or leased computers in furtherance of non-official duties, common sense surely would allow the court to see as reasonable the state's desire to limit misuse of its resources. Further, because the state, as an employer, could be held liable for sexual harassment infractions, it has a strong interest in preventing inappropriate use of its computers. Justice O'Connor's opinion in Rankin suggests, if not proclaims, the necessity for government employers to impede such behaviors and the deference they are to be given in promulgating restrictions to effect those ends.

{82} On the other hand, it is essential that these six state-employed university faculty members be allowed not only to participate in the free and open discussion on issues that impact the public's daily lives, but to bring to that discussion their special knowledge and heightened expertise. This is the kingpin issue of plaintiffs' argument, and it is on the weight of this issue alone that the balance may tip in their favor. The Act's impact, at least in the plaintiffs' view, is that their ability to carry out the necessary scholarly exercises that inform and advance the public policy and knowledge base is in danger. Arguably worse than the impact on the faculty themselves is the detriment to the public.

{83} The third factor suggested by the *Pickering* court concerns the consequences exacted on the speaker as a result of her speech. This is a curious, but telling factor in the present case. Except for NTEU, the consequences to the speaker in the preceding cases were severe, ranging from transfer and reassignment of job duties to summary dismissal. The courts found the severity of the consequences to be a strong factor in the plaintiffs' favor in those cases. Here, however, the consequences are vague, if they exist at all.

{84} The Act is not a criminal act for which penalties have been assigned. Instead, the absence of any sanction makes it appear as if each agency must determine how it will respond administratively to infractions. Each plaintiff is already covered, either by policies of the state's Department of Personnel and Training or the policies of their respective institutions.[124] One would presume that the sanctions available under those

policies would be applicable here. If so, that renders the Act either superfluous, inasmuch as the pre-existing policies prescribing sanctions would prevail, or toothless since the Act's failure to include penalties renders other infractions moot. However, this inherent ambiguity over what sanctions the transgressor faces should lead a court to weigh this factor heavily in favor of the plaintiffs.

{85} On the basis of these three factors alone, it remains arguable as to whose side of the scale prevails. Thankfully, the analysis does not end here. The court next must determine what level of scrutiny it should apply. While one commentator has discussed the appropriateness of a strict scrutiny standard,[125] a less stringent standard should be applied[126] since the government enjoys greater discretion when it regulates the speech in its role as an employer than it does when it acts as a sovereign.[127]

{86} If that lesser standard of scrutiny were a rational basis approach, the Commonwealth might win. However, Sullivan nags at the conscience and begs a higher standard. This case is not about obscenity, hate speech or fighting words. It is about a law that hinders public debate on essential topics. In addition, the Act contains a clear threat to any agency head that might dare challenge it, by placing that administrator on notice that her approvals are subject to the review and second guessing of the citizenry.[128] Surely, under the *Pickering* test and when an intermediate level of scrutiny is applied, the plaintiffs must prevail.

{87} Yet, therein lies the limitation of the *Pickering* test. It has the laudable, built-in objective of protecting speech on matters of public concern, but a pragmatic view yields a different result. To be sure, academic freedom is of the utmost concern to the public and deserves wide latitude.[129] The plaintiffs, however, have not demonstrated that the Act has hindered them in their professional capacities beyond the inconvenience of seeking prior approval. Further, since the Act only limits their use of state-owned or state-leased computers without permission, it does not deny them access to the material through non-state-owned and non-state-leased computers. The result is that plaintiffs are free under the Act to use their personal computers, or to hunt down the materials the old fashioned way. Inconvenient? Yes. Inefficient to their employers? Yes. Should that be the employer's prerogative? Yes.

{88} If the facts of this case were to occur in the private sector, there would be no discussion. The fact occurs in the public sector should not lead to a different result. The government, as an employer, is a market participant. To be such, requires it to employ and to manage a human resources infrastructure with the objective of providing mandated services in an efficient, cost-effective and competitive manner. That the "owners" of this service organization happen to be the public at large and that they happen to have no choice about their stake in the ownership only serves to obscure the legitimate prerogatives of officials charged with running the "business" on a day-to-day basis. They ought be held accountable, but not be held to a higher standard than we hold their private sector counterparts.

VI. CONCLUSION

{89} This case is important because it calls into question, despite the prior decision of the Fourth Circuit, the degree to which government can limit the speech or freedom of expression of the ideas of its employees that transcend the mere general interest of the public. In the case at hand, the plaintiffs were employed at universities, of which the contributions to the advancement of research and dissemination of knowledge are central to the progress of mankind in all its endeavors.

{90} The Supreme Court recognizes that scholastic curricula are matters of public concern.[130] Justice Frankfurter's admonition[131] notwithstanding, all decisions must be made by some entity. The issue here is not who makes the decision, but who is allowed to comment on the topic prior to that decision being made.

While institutions of higher education may possess Justice Frankfurter's four essential freedoms, that does not deny, per se, the right of the public to speak out on the issues. If, as the Act mandates, administrators have unfettered control over the content of the curricula, then public input is denied.

{91} Under *Pickering*, plaintiffs should prevail. Under the common sense approach, the Commonwealth should win. How the United States Court of Appeals for the Fourth Circuit will respond upon an en banc rehearing is predictable - the Commonwealth will win. The real unknown is how the court will reconcile this common sense result with *Pickering's* time-tested approach.

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[1]. 167 F.3 191 (4th Cir. 1999)

[2]. See Va. Code Ann. §§ 2.1-804 to -806 (Michie Supp. 1998).

[3]. Urofsky v. Gilmore, 167 F.3d 191 (1999).

[4]. The Virginia House of Delegates subsequently passed a bill amending § 2.1-804 that redefines "sexually explicit content" as: "content having as its dominant theme (i) any lascivious description of or (ii) any lascivious picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, copraphilia, urophilia, or fetishism." 1999 Va. Laws ch. 384 (H.B. 2343). Although the prior definition of sexual content was at issue in the district court proceedings, plaintiffs contend that their free speech rights continue to be infringed under the amended Act. This casenote confines its discussion and analysis to the issues that are still relevant under the amended Act.

[5]. 391 U.S. 563 (1968).

[6]. New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964) (quoting the Alabama state law) (citations omitted).

[7]. Id. at 256 (quoting the advertisement placed in the New York Times).

[8]. Id. at 296 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[9]. Id. at 296 (Black, J. concurring).

[10]. 391 U.S. 563 (1968).

[11]. See United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

[12]. See Rodric B. Schoen, *Pickering* Plus Thirty Years: Public Employees and Free Speech, 30 Tex. Tech.

L. Rev. 5, 7 (1999).

[13]. Pickering v. Board of Education, 391 U.S. 563 (1968).

[14]. Id. at 575. Marvin Pickering's letter as published by Graphic Newspapers, Inc. on Sept. 24, 1964, p. 4. The Supreme Court found that Pickering's letter made eight principal allegations against the school board. In its allegation-by-allegation analysis, the Court found four to be incorrect, but viewed "the manner in which [they] are false [as] perfectly consistent with good-faith error . . . ."

[15]. Id. at 566. Pickering's letter also included criticism of the school board's mismanagement of funds received from an earlier school bond issue and their subsequent allocation between academic and athletic programs. See id. at 566.

[16]. Id. at 568.

[17]. Id.

[18]. Id. at 570.

[19]. Id.

[20]. See id. at 571.

[21]. See id. at 571-572. Specifically, the Court stated, "Teachers are . . . members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." Id. at 572.

[22]. See id. at 574 (noting that Pickering's employment was "only tangentially and insubstantially involved in the subject matter of the public communication [he] made.")

[23]. See id. (recognizing that, in Pickering's situation, the threat of dismissal . . . is . . . a potent means of inhibiting speech." Presumably, lesser consequences would carry less weight for the complainant in the Court's balancing approach.)

[24]. See id. at 582-584 (White, J. concurring in part and dissenting in part.)

[25]. 376 U.S. 254 (1964).

[26]. See Pickering, 391 U.S. at 583.

[27]. Id. at 582.

[28]. 5 U.S.C. App. § 501 et seq. (1988 ed., Supp. V).

[29]. See United States v. National Treasury Employees Union, 513 U.S. 454, 459 ("Section 505 of the Ethics Reform Act defined "officer or employee' to include nearly all employees of the Federal Government and "Member" to include any Representative, Delegate, or Resident Commissioner to Congress.")

[30]. United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

[31]. See id. at 461.

[32]. See id.

[33]. The Court recalled that several Americans famous for their literary contributions were also government employees. Specifically, the Court cited Nathaniel Hawthorne, Herman Melville, Walt Whitman and Bret Harte. See United States v. National Treasury Employees Union, 513 U.S. at 465.

[34]. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[35]. Id. at 468.

[36]. Connick v. Myers, 461 U.S. 138 (1983).

[37]. See id. at 155. Of the 13 questions contained in the survey, the majority found only one to have a bearing on the public's interest. The rest were deemed to be of a personal interest.

[38]. Id. at 143 (emphasis added).

[39]. Id. at 147, 148.

[40]. See id. at 163 (Brennan, J. dissenting).

[41]. Id. In his dissent, Justice Brennan comments, "I would hold that Myers' questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the Orleans Parish District Attorney . . . discharges his duties.")

[42]. See id. at 149. Justice White's majority opinion recognized that Court could not sweep Myers' entire claim under the rug "[b]ecause one of the questions in Myers' survey touched upon a matter of public concern."

[43]. See id. at 146. "Pickering, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."

[44]. Id. at 143 (quoting Perry v. Sindermann, 408 U.S. 593, 598 (1972); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979)).

[45]. Rankin v. McPherson, 483 U.S. 378, 381 (1987).

[46]. Id. at 383.

[47]. See id. at 390 (noting that where the charge is that an employee's statement "somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. . . . We cannot believe that every employee . . . is equally required . . . to avoid any statement susceptible of being interpreted by the Constable as an indication that the employee may be unworthy of employment in his law enforcement agency." Id. at 390-391.

[48]. Id. at 388.

[49]. 45 F.3d 790 (4th Cir. 1995).

[50]. Id. at 805.

[51]. Id. at 794. (the language in the case suggests that DiMeglio was merely offering his opnion about the deal, "stating essentially that the offer was not a 'good deal.'" Id. However, Haines construed DiMeglio's comment as an offer of legal advice.)

[52]. See id. at 793.

[53]. See id. at 804. Haines would not be immune to DiMeglio's suit if Haines were found to have broken the law by violating DiMeglio's constitutional right to free speech. The court, therefore, was required to determine if DiMeglio' speech was protected, hence the analysis a la Connick and Pickering.

[54]. Id. at 805 (quoting Terrell v. University of Tex. Sys. Police, 792 F.2d 1360 (5th Cir. 1986), cert. denied 479 U.S. 1064 (1987)).

[55]. Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (1989).

[56]. Boring, 136 F.3d at 369 (referring to Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (1989)).

[57]. 136 F.3d 364 (4th Cir. 1998).

[58]. See id. at 366-367. A more complete recitation of the facts in this case would include the fact that Boring, upon selecting the play, forwarded it to her principal for approval. The principal edited certain material from the play and returned the revised, but approved, copy to Boring. Only after the play had been performed in a regional competition did a parent learn of the play's content and complain to the principal. After the complaint, the school invoked the school board's controversial materials policy and transferred Boring.

[59]. See id. at 367.

[60]. Sweezy v. New Hampshire, 354 U.S. 234, 255, 263-264 (1957).

[61]. Boring, 136 F.3d at 368.

[62]. Waters v. Churchill, 511 U.S. 661, 671 (1994).

[63]. Id. at 672.

[64]. Id. at 673.

[65]. Id. at 673.

[66]. Id.

[67]. National Treasury Employees Union, 513 U.S. at 481.

[68]. Id. at 466.

[69]. Connick, 461 U.S. at 147.

[70]. DiMeglio effectively turns the Pickering holding into the threshold inquiry.

[71]. See Va. Code Ann. §§ 2.1-804 to -806 (Michie Supp. 1998).

[72]. Urofsky v. Allen, 995 F. Supp. 634, 635 (1998).

[73]. Id at 635.

[74]. Id.

[75]. Id.

[76]. Id. at 636 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

[77]. Id.

[78]. Id. (referencing Roth v. United States, 354 U.S. 476, 487 (1957)).

[79]. Id. (referring to National Treasury Employees Union v. United States, 513 U.S. 454, 467 (1995)).

[80]. Id. at 637. See also Regan v. Time, 468 U.S. 641, 648-649 ("[regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."). Id.; Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 ("content-based burdens on the speech raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"). Id.

[81]. Id. at 638.

[82]. Id.

[83]. Id.

[84]. Id.

[85]. Id. (The court cited the Supreme Court, which said, ":Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (quoting First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 783 (1978)).

[86]. One of the examples involved plaintiff Paul Smith's website. The site contained images of a sexual nature, and several employees complained to the vice-provost for information technology at Smith's university. See id. at 639.

[87]. Id.

[88]. Id.; See also Carey v. Brown, 447 U.S. 455, 465 (1980) (stating that " a statute's over- and under-inclusiveness 'ndermine [the] claim that the prohibition . . . can be justified by referee to the State's interest.'") (alteration in original) (citations omitted); R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)(recognizing " [t]he existence of adequate content-neutral alternatives thus 'undercut[s] significantly' any defense of a statute.")(first alteration added)(citing Boos v. Barry, 485 U.S. 312, 329 (1988)).

[89]. Id. at 640.

[90]. Id.

[91]. Id.

[92]. Id.

[93]. Id.

[94]. See id. at 642.

[95]. Id.

[96]. Id.

[97]. Id. at 643.

[98]. Id.

[99]. Id.

[100]. See supra notes 13-18 and accompanying text.

[101]. Id. at 636.

[102]. Urofsky v. Gilmore, 167 F.3d at 195 (referring to Connick, 461 U.S. at 143) (emphasis added).

[103]. Id. at 196.

[104]. See id. (citing to DiMeglio, 45 F.3d at 805 (1995) "that 'the Court ha[s] distinguished between speaking as a citizen and as an employee, and ha[s] focused on speech as a citizen as that for which constitutional protection is afforded.'").

[105]. See Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (1998).

[106]. See Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (1989).

[107]. Urofsky v. Gilmore, 167 F.3d at 195-196.

[108]. Urofsky v. Allen, 995 F. Supp. at 640.

[109]. Boos v. Barry, 485 U.S. 312 (1988).

[110]. Urofsky v. Gilmore, 167 F.3d at 196 n.8 (citing Boos, 485 U.S. at 331).

[111]. See Urofsky, 167 F.3d at 195, 196.

[112]. Id. a 196 (referring to Connick, 461 U.S. at 147-48).

[113]. 792 F.2d 1360 (5th Cir. 1986).

[114]. 167 F.3d at 195 (citing Terrell, 792 F.2d at 1362. Terrell involved a private diary kept by the plaintiff on issues regarding his supervisor's job performance. The Terrell court stated, "a writing 'not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest.'" Id. (citing Connick, 461 U.S. at 148)).

[115]. See id. at 195. (the court notes in Rankin v. McPherson, 483 U.S. 378 (1987) that plaintiff's speech

occurred at the workplace, while in DiMeglio, 45 F.3d 790 (4th Cir. 1995), the speech occurred outside the workplace. The importance of this analysis is unclear because (a) the location of the speech in the subject case is not at issue, and (b) while DiMeglio's speech was made in the field, due to the nature of his job, the field was DiMeglio's place of business. Therefore, there is no real distinction between Rankin and DiMeglio on this issue.)

[116]. Id. at 196.

[117]. See generally, Board of Educ. v. Pico, 457 U.S. 853 (1982).

[118]. See generally, Epperson v. Arkansas, 393 U.S. 97 (1968).

[119]. 136 F.3d at 369 (citing to Kirkland, 890 F.2d at 800).

[120]. Va. Code Ann. § 2.1-805 (Michie Supp. 1998).

[121]. See Va. Code Ann. § 2.1-342.01 (Michie Supp. 1998).

[122]. Pickering, 391 U.S. at 569.

[123]. See Urofsky v. Gilmore, 167 F.3d at 198 (the court stating, "The Act regulates the speech of individuals speaking in their capacity as Commonwealth employees, not as citizens, and thus the Act does not touch upon a matter of public concern."

[124]. See Urofsky v. Allen, 995 F.Supp. at 643. This is one of plaintiffs' primary arguments. Plaintiffs assert that content-neutral alternatives to the Act already exist."

[125]. See Dana R. Wagner, The First Amendment and the Right To Hear; Urofsky v. Allen, 995 F. Supp. 634 (E.D. Va. 1998), 108 Yale L.J. 669, note 36 (predicated on the Act's content-discriminatory nature.).

[126]. See Urofsky v. Allen, 995 F.Supp. at 637 (stating that "the government's justification for the restriction must be correspondingly higher" when it "establishes a prospective deterrent 'to a broad category of expression by a massive number of potential speakers . . . .'" Id. (quoting NTEU, 513 U.S. at 467)).

[127]. See generally Rankin, 483 U.S. 378 (1987)(stating that "[T]he government's power as an employer to make hiring and firing decisions on the basis of what its employees... say has much greater scope than its power to regulate expression by the general public." Id at 395.)

[128]. See supra notes 119 & 120 and accompanying text.

[129]. See generally Robert O'Neil, Free Speech in the College Community, 29 Ariz. St. L.J. 537 (1997).

[130]. See supra notes 37 & 38 and accompanying text.

[131]. See supra note 20 and accompanying text.

Related Browsing
